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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 384

HOWARD E. BREISCH,

Petitioner,

vs.

CENTRAL RAILROAD OF NEW JERSEY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FRED B. GERNERD,
DAVID GETZ,
Counsel for Petitioner.

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To the Honorable Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner Howard E. Breisch prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit, entered in the above entitled cause on June 3, 1940.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 112 F. (2) 595 (R. 110).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 3, 1940.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statutes Involved.

The pertinent statutes involved are the Federal Safety Appliance Act, Safety Appliance Act of April 14, 1910 (Title 160, Sec. 2, 36 Stat. 298); Pennsylvania Workmen's Compensation Act of 1915, P. L. 736.

Applicable excerpts therefrom will be found in the Appendix.

Question Presented.

An employee of a railroad, which is a highway of interstate commerce, was injured in Pennsylvania as a result of the failure of a safety appliance to operate properly, which injury occurred when the employee was engaged in intrastate commerce. There are decisions of the highest State court in Pennsylvania which permit an employee so injured to bring an action at law.

Did the Circuit Court of Appeals err in deciding that the employee had no right to sue for damages at law and that his sole remedy was to recover compensation under the provisions of the Pennsylvania Workmen's Compensation Act?

Statement of the Case.

Petitioner's complaint alleged that petitioner was injured while in the employ of the Central Railroad Company of New Jersey, a highway of interstate commerce, by reason of a defective handbrake contrary to the provisions of the Federal Safety Appliance Act, and prayed for damages approximately resulting from such defect. In the action in the District Court, the jury brought in a verdict in favor of the plaintiff in the sum of $12,000.00. Motions for a new trial and judgment *n.o.v.* were made by the defendant.

Argument was made upon the motions before the District Court which denied the motions and directed that plaintiff enter judgment on the verdict rendered by the jury with costs.

The Circuit Court of Appeals of the Third District reversed the judgment on the ground that the sole remedy of the petitioner was under the Pennsylvania Workmen's Compensation Law.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In disregarding the decisions of the Pennsylvania Supreme Court;

2. In holding that the Pennsylvania Workmen's Compensation Act was the sole remedy of the petitioner for a violation of the Federal Safety Appliance Act.

Reasons Why Writ Should Be Granted.

I.

The Circuit Court of Appeals decided an important question of local law in conflict with applicable local Pennsylvania Supreme Court decisions.

The Federal Safety Appliance Act leaves the nature and incidents of the remedy to State law. *Tipton* v. *Atchinson, Topeka and Santa Fe Rwy. Co.*, 298 U. S. 141.

The law of Pennsylvania according to decisions of the highest court of the State of Pennsylvania is: an employee of a railroad, which is a highway of interstate commerce, who was injured while engaged in an intrastate movement as a result of safety equipment failing to operate properly can maintain a suit at law for damages.

In the case of *Sims* v. *Penna. R. R. Co.*, 279 Pa. 111, where the same facts existed as are present in the instant case the right of the injured railroad employee to maintain a

suit at law was upheld. Here the Supreme Court of Pennsylvania reviewed the holding of a trial court to the effect the plaintiff was properly non-suited when he could not prove the cars causing the injury were at the time engaged in interstate commerce. The Supreme Court of Pennsylvania held that the proofs made out a prima facie case for injuries sustained in intrastate traffic.

Then followed the case of *Miller* v. *Reading Co.*, 292 Pa. 44, where the court in a case presenting facts similar to the instant case, held that the plaintiff could maintain a suit at law and was not compelled to accept the provisions of the State Workmen's Compensation Act.

The case of *McMahon* v. *Montour*, 270 U. S. 628, likewise permits suit by a plaintiff in an action at law who was injured under the same circumstances as the petitioner was in the instant case.

However, the Circuit Court of the United States for the Third Circuit disregarded the principle which is set forth in the above three cases and held (R. 116) that the remedy of the petitioner was solely within the Pennsylvania Workmen's Compensation Act and was not cognizable in an action at law. It must be remembered that the Workmen's Compensation Act was enacted in 1915, nine years before the *Sims* case.

The Circuit Court disregarding entirely the fact that the *Sims* case, *supra*, and the *McMahon* case, *supra*, permitted such suits at law and taking into consideration only the *Miller* case, held (R. 115) that the decision in that case was not binding upon the ground that in the *Miller* case, The Supreme Court of Pennsylvania had erroneously construed the scope of the Federal Safety Appliance Act and had not been engaged purely in construing a State Statute.

However, as Circuit Court Judge Jones points out in his

dissenting opinion (R. 120) the *Miller* case does constitute a decision of the highest court of the State of Pennsylvania, which is binding upon the Federal Courts. It is submitted that the writ should be granted because the Circuit Court was bound to follow the Pennsylvania decisions.

II.

The decision below conflicts with decisions of other Circuit Courts of Appeals.

The decision below conflicts with the case of *Leuthe* v. *Erie R. R. Co.*, 83 F. (2d) 1013, decided May 4, 1936. Here the plaintiff was injured in the State of New York while working on a railroad which was a highway of interstate commerce, while engaged in an intrastate movement because of the failure of a safety equipment to operate properly.

Suit was brought in the District Court which upheld the right of the plaintiff to sue at law (12 F. Supp. 161). The District Court found itself bound by the holding of the New York Court of Errors and Appeals in *Ward* v. *Erie R. R. Co.*, 230 N. Y. 230, a case which is similar to the *Miller* case. The Circuit Court of Appeals for the Second Circuit in a *per curiam* opinion affirmed the judgment of the District Court.

However, the Circuit Court of Appeals for the Third Circuit in the instant case refused to follow the Pennsylvania decisions.

Conclusion.

It is respectfully submitted that this petition should be granted.

FRED B. GERNERD,
DAVID GETZ,
Attorneys for Petitioner.

APPENDIX.

I.

Safety Appliance Act.

"It shall be unlawful for any common carrier subject to the provisions of this chapter to haul, or permit to be hauled or used on its line, any car subject to the provisions of this chapter not equipped with appliance herein provided for, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."

(April 14, 1910, c. 160, Sec. 2, 36 Stat. 298.)

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